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2 **BEFORE THE FOREST PRACTICES APPEALS BOARD**
3 **of the**
4 **STATE OF WASHINGTON**

5 **COLUMBIA GORGE AUDUBON**)
6 **SOCIETY,**)

7 **Appellant,**)

8 **v.**)

9 **STATE OF WASHINGTON,**)
10 **DEPARTMENT OF NATURAL**)
11 **RESOURCES; DEPARTMENT**)
12 **OF FISH AND WILDLIFE; and**)
13 **SDS LUMBER COMPANY;**)

14 **Respondents.**)
15 _____)

FPAB NO. 94-16

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

16 This matter came on before the Honorable William A. Harrison, Administrative
17 Appeals Judge, presiding, and Board Members Norman L. Winn, Chairman, Dr. Martin R.
18 Kaatz, and Robert E. Quoidbach.

19 The matter is an appeal of an approved forest practices application alleged to have
20 potential for harm to the western gray squirrel and the pileated woodpecker.

21 **Appearances were as follows:**

- 22 1. Jay F. Sherrerd, Attorney at Law, for Columbia Gorge Audubon Society.
23 2. Michael G. Neff, Attorney at law, for SDS Lumber Company.
24 3. Kay M. Brown, Assistant Attorney General, for Department of Natural Resources.
25 4. Neil L. Wise, Assistant Attorney General, for Department of Fish and Wildlife.

26 The hearing was conducted at Olympia, Washington, on June 3, 1994.

27 Gene Barker and Associates, Olympia, provided court reporting services.

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2 Witnesses were sworn and testified. Exhibits were examined. From testimony heard
3 and exhibits examined, the Forest Practices Appeals Board makes these

4 **FINDINGS OF FACT**

5 **I**

6 This matter arises in Klickitat County near the White Salmon River, north of Husum.
7 It concerns the effect of timber harvesting on two species of wildlife: 1) the western gray
8 squirrel and 2) the pileated woodpecker.

9 **II**

10 The Western Gray Squirrel. The preferred habitat of the western gray squirrel is the
11 oak/pine forest which provides the acorns and pine cones that make up its diet. In Washington
12 State, there are only three remaining areas where this animal is found: 1) in the Columbia
13 Gorge, 2) in parts of the Okanogan area and 3) at Fort Lewis. A decline of the western gray
14 squirrel numbers has followed from the decline of oak/pine habitat. Forest fire suppression
15 has contributed to this by preventing the wildfire that formerly gave the oak/pine forest an
16 opportunity to grow back after the fire. The result is forests of more fir and less oak/pine.

17 **III**

18 In November, 1993, the Washington State Department of Fish and Wildlife (DFW)
19 offically listed the western gray squirrel as a threatened species in Washington State.

20 **IV**

21 Respondent, SDS Lumber Company, proposed a salvage harvest of 192 acres within an
22 area of suitable western gray squirrel habitat. The site contains a mixed oak/pine and fir
23 forest, with a large part being fir. The growth of oaks in the stand is impeded by the shade of
24 the taller conifers. Some of the pines are infested by the western pine beetle.

V

The intent of SDS is to thin the stand to obtain some marketable timber (mostly fir), and to remove beetle-invested pine, and to invigorate the growth of the oaks. In consultation with the DFW, SDS proposed a 22 acre clear cut and a 170 acre thinning of 40% of volume. One upland management area of 25 acres and another of 5 acres will be left. Within these, all oak trees will be left. Outside those areas, SDS will leave all larger oaks, which will total at least 200 trees. Most healthy pines will remain. An average 60% canopy will remain on the thinned portion.

VI

The DFW has shown interest in purchasing the 19 acre site as a possible link in publicly owned habitat for the western gray squirrel. There is no offer of purchase to date. The DFW area habitat biologist would recommend removal of the diseased pine were the site bought by DFW.

VII

Due to lack of personnel and resources, the DFW will not survey for the presence of western gray squirrel before each timber harvest in suitable habitat. The DFW did not survey for the squirrel in this case.

VIII

Due to the lack of a standard protocol for conducting a survey for western gray squirrel, landowners are not asked by DFW to survey before harvesting in suitable habitat. SDS did not survey for the squirrel in this case.

IX

The policy of DFW in effect at the time of this matter, is to protect only "known occurrences" of the western gray squirrel. This means that an individual squirrel or its nest

1
2 must have been observed on or very near the site in question. Records of the DFW shown no
3 such observation for the SDS site.

4 X

5 The appellant has not shown that the western gray squirrel, or its nest, is present on or
6 near the SDS site. The testimony of a lay witness called by appellant is that he thinks he has
7 seen this animal and that his daughter may have seen a nest. We find this testimony to be
8 unpersuasive. In so finding, we note that non-threatened species of squirrels also exist in
9 Washington, and in the areas in question. Two of these -- the Douglas squirrel and the
10 California ground squirrel -- are gray in color. The casual observations attested to in this
11 matter do not constitute a credible observation of the threatened squirrel species. Moreover,
12 appellants were afforded an opportunity to have their biologist survey the SDS site for the
13 western gray squirrel. No such survey was conducted.

14 XI

15 There is no known occurrence of the western gray squirrel, or its nest, on or near the
16 SDS site.

17 XII

18 If a nest of the western gray squirrel were discovered during logging, SDS agrees to
19 work with DFW to maintain appropriate buffers.

20 XIII

21 At times pertinent to this matter, there was no forest practices regulation relating to the
22 western gray squirrel. Draft proposals for such a rule, now under development, would
23 preserve a canopy closure between 35% and 50% in the vicinity of a nest with no harvest
24 allowed in a 50 foot radius around a nest tree. See proposed WAC 222-30-130. -

1
2 XIV

3 The SDS harvest, leaving a 60% canopy in the 170 acres to be thinned and leaving
4 numerous oaks and pine will preserve western gray squirrel habitat. It would apparently do so
5 to a greater extent than the proposed forest practices rules.

6 XV

7 Pileated Woodpecker. The DFW recognizes that the SDS site contains suitable pileated
8 woodpecker habitat. However, the pileated woodpecker is not listed as either threatened nor
9 endangered. While suitable habitat for this species is declining, this habitat loss has not
10 reached a critical stage. No scientific study shows a declining population of pileated
11 woodpecker in the Columbia Gorge.

12 XVI

13 The home range of the pileated woodpecker is about 900 acres. Of these, 50% should
14 have a 60% canopy cover. Here, most of the site in question would be retained with 60%
15 canopy cover. The appellant has not shown that the proposed harvest would adversely affect
16 pileated woodpecker habitat.

17 XVII

18 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
19 From these Findings of Fact, the Board issues these:

20 CONCLUSIONS OF LAW

21 I

22 The Forest Practices Act confers upon the Washington State Department of Natural
23 Resources (DNR) certain powers and responsibility. Among these is the authority to condition
24 applications to "prevent material damage to public resources." Snohomish County and
25 Washington Environmental Council v. DNR, DOE, FPB, et. al., FPAB Nos. 89-12 and

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2 89-13, reviewed on other grounds, 69 Wn. App. 655, 850 P.2d 546 (1993), pet. for review
3 denied 123 Wash. 2d 1003 (1994). See RCW 76.09.080(1)(C) and RCW 76.09.090.

4 II

5 Both the western gray squirrel and the pileated woodpecker are wildlife and therefore
6 "public resources." RCW 76.09.020(13).

7 III

8 Western Gray Squirrel. The western gray squirrel was not proven to exist on the site in
9 question. The remaining trees, following harvest, are useful habitat for this species. The
10 effect of the salvage harvest will be to invigorate growth of the remaining oaks which are
11 important food sources for this species. The proposed forest practices have not been shown to
12 create the potential for material damage to the western gray squirrel.

13 IV

14 In the event that a western gray squirrel nest is observed during these forest practices,
15 SDS should contact DNR to determine any appropriate buffer.

16 V

17 Pileated Woodpecker. The appellant has not shown that this harvest would reduce
18 pileated woodpecker habitat below levels necessary to support that species. There has been no
19 showing of a potential for material damage to pileated woodpeckers from the proposed forest
20 practices.

21 VI

22 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
23 From the foregoing, the Board issues this:

1
2 **ORDER**

3 The forest practices application is remanded to the Department of Natural Resources to
4 add a condition that if a western gray squirrel nest is observed during operations, SDS shall
5 contact DNR to determine and maintain an appropriate buffer. As so amended, the application
6 is affirmed.

7 DONE at Lacey, WA, this 13th day of July, 1994.

8
9 William A. Harrison
10 HONORABLE WILLIAM A. HARRISON
11 Administrative Appeals Judge

12 **FOREST PRACTICES APPEALS BOARD**

13 Norman L. Winn
14 NORMAN L. WINN, Chairman

15 Martin R. Kaatz
16 DR. MARTIN R. KAATZ, Member

17 Robert E. Quoidbach
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